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What Happens to My Stock Option Plan when I Get Mobilized?

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1.3.1.1—Left Job for Service and Gave Prior Notice

1.3.1.2—Character and Duration of Service

1.3.2.2—Continuous Accumulation of Seniority-Escalator Principle

1.3.2.10—Furlough or Leave of Absence Clause

1.4—USERRA Enforcement

***Winders v. People Express Airlines, Inc.,* 595 F. Supp. 1512 (D.N.J. 1984), *affirmed* 770 F.2d 1078 (3rd Cir. 1985).**

This case is more than 27 years old, and it was decided a decade before Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) in 1994, but it remains an important precedent about the rights of the individual who leaves a civilian job for voluntary or involuntary service in the uniformed services.

Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which goes back to 1940. Congress made some significant improvements in 1994, but you should think of the reemployment statute as being 72 years old, not 18.

USERRA's legislative history includes the following statement:

> The provisions of Federal law providing members of the uniformed services with employment and reemployment rights, protection against employment-related discrimination, and the protection of certain other rights and benefits have been eminently successful for over fifty years. Therefore, the Committee [House Committee on Veterans' Affairs] wishes to stress that the extensive body of case law that has evolved over that period, to the extent that it is consistent with the provisions of this Act, remains in full force and effect in interpreting these provisions. This is particularly true of the basic principle established by the Supreme Court that the Act is to be 'liberally construed.' See *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946); *Alabama Power Co. v. Davis*, 431 U.S. 581 (1977)." House Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News (USCCAN)* 2449, 2452.

It should also be noted that USERRA's legislative history favorably cites *Winders* in two places. 1994 *USCCAN* at 2458, 2466.

Some employees receive the option to buy stock in the company at a favorable price as part of their compensation. The employee usually receives "restricted" stock—stock that cannot

immediately be sold on the open market. The restrictions on the stock are removed after the employee has remained with the company for a specified period of time. These stock options can be very valuable if the open market price of the company's shares soars. The company may establish a stock option plan in order to give employees an incentive to work hard and be loyal to the company, in order to make the company's business plan work. Also, with a start-up company there may be a shortage of cash to pay employees their true worth. The company may offer stock options in order to attract the quality and quantity of employees needed to make the company thrive.

People Express Airlines is an excellent example of a start-up company that soars for a time and then crashes and burns. Jimmie L. Winders, a Major in the Air National Guard, was hired by the airline on March 9, 1981. He was one of the very first pilots when the company started operations on April 3, 1981. As a new employee of this start-up airline, Winders was required to purchase at least 500 shares of company stock, and he was given the opportunity to purchase more. On May 31, 1981, Winders purchased the 500 mandatory shares and an additional 2,000 optional shares. He executed two promissory notes, in the amount of $1,495 for the mandatory shares and $10,980 for the optional shares. On August, 14, 1981, Winders paid $4,250 in cash for an additional 500 optional shares.

Winders remained employed by the airline until May 1982, when he took advantage of an opportunity to reenter active duty in the Air Force for a voluntary special assignment. While so employed, Winders made payments on the two promissory notes through payroll deductions. By the time he left the airline for military service, Winders had paid $305 on the $1495 note for the mandatory shares and $5,519 on the $10,980 note for the initial optional shares.

From May 17, 1982 until May 28, 1982, Winders was on paid vacation from the airline. By Air Force orders dated April 16, 1982, Winders was ordered to report to the Air National Guard Support Center (Andrews AFB in Maryland) on May 17, 1982, for a period of 24 months of extended active duty, and Winders duly reported as ordered. He did not inform the airline that he was on active duty until May 28, 1982, the last day of his scheduled vacation.[1]

On May 28, Winders spoke with the airline's Chief Pilot and its Chief of Flight Operations, and he also delivered a letter to the airline on that same date. In the letter and the conversation, he requested a 48-month military leave of absence[2] and he also inquired about continuing his participation in the stock option plan while on active duty. When the airline did not respond, Winders retained an attorney. The attorney sent letters to the airline on July 26, August 16, and November 9, 1982, reiterating Winders' request for military leave and his request to remain in the stock option plan. On August 3, 1982, the airline sent Winders a letter, requesting a copy of his active duty orders, and Winders duly provided a copy of his orders.

The airline ceased communicating with Winders until September 6, 1983, when the airline's counsel informed Winders' counsel that Winders' request for military leave was denied. By that same letter, the airline informed Winders that the promissory notes were canceled and that Winders' request to continue participating in the stock option plan was disapproved. The airline returned to Winders the money that he had paid for stock. During this time period, the airline was spectacularly successful and the stock price soared. As a result of a stock split and the soaring price, Winders' shares would have been worth $131,240 on September 6, 1983. The gross disparity between what Winders paid and what the stock came to be worth explains why Winders filed this lawsuit.

There are two USERRA clauses that are directly pertinent to this sort of claim: the "escalator principle"[3] and the "furlough or leave of absence clause." USERRA made some major changes in 1994, but these two clauses did not change in a significant way that is relevant to this stock option issue.

USERRA's escalator principle provision is as follows:

> A person who is reemployed under this chapter is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if continuously employed.
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> 38 U.S.C. 4316(a).

USERRA's furlough or leave of absence clause is as follows:

> Subject to paragraphs (2) through (6)[4], a person who is absent from a position of employment by reason of service in the uniformed services shall be—(A) deemed to be on furlough or leave of absence while performing such service; and (B) entitled to such other rights not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.
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> 38 U.S.C. 4316(b)(1).

You should think of the escalator principle and the furlough or leave of absence as complementary, not contradictory. The escalator principle deals with *seniority* rights *upon reemployment.* The furlough or leave of absence clause deals with *non-seniority rights during the period of service.*

The *Winders* case was decided by Judge Dickinson Richard Debevoise of the United States District Court for the District of New Jersey, a veteran of World War II and the Korean War. He served as an enlisted member of the Army in World War II, and he was recalled to active duty from the Army Reserve, as a junior officer, for Korea. He knows the importance of the reemployment statute to national defense, and he cited Supreme Court precedent to the effect that this statute is to be liberally construed for the veteran.[5]

Under the airline's stock option plan, the restrictions on an employee's stock are released after the employee has been employed for a period of time. Thus, Judge Debevoise held that the conversion of restricted stock to unrestricted stock, that the employee is permitted to sell at the market price, is a perquisite of seniority for purposes of the escalator principle.

Normally, the returning veteran is not considered to have a ripe reemployment claim until he or she has returned from service and applied for reemployment with the pre-service employer. Winders brought this suit in April 1984, while still on active duty. Winders went on active duty in May 1982, so his four-year limit under the VRRA was scheduled to expire in May 1986, and Winders remained on active duty until leaving just before the expiration of the four-year limit. If he had waited until he left active duty to bring this suit, the stock options likely would have become worthless as the value of the airline's stock plummeted.

Judge Debevoise utilized his equitable powers and fashioned a remedy requiring the airline to pay Winders if and when he left active duty and timely applied for reemployment with the airline. His order provided that Winders would get nothing except return of his stock payments if he failed to apply for reemployment after leaving active duty in May 1986.

The airline appealed to the 3rd Circuit, the federal appellate court that sits in Philadelphia and hears appeals from district courts in Delaware, New Jersey, and Pennsylvania. The 3rd Circuit affirmed Judge Debevoise's judgment without writing its own opinion. The airline did not apply to the Supreme Court for *certiorari,* and the *Winders* case thus became final.

Although *Winders* is cited with approval in USERRA's 1994 legislative history, it is not cited in any subsequent published court decision. That is unfortunate. I am writing this article to bring attention to the excellent *Winders* decision. I have heard from several National Guard and Reserve personnel who were participating in stock option plans when called to active duty. This remains an important issue.

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[1] Under the VRRA, the employee leaving work for active duty was not required to give prior notice to the civilian employer, but the employee was required to request a military leave of absence for active duty for training or inactive duty training. Under section 4312(a) of USERRA [38 U.S.C. 4312(a)], the employee is required to give prior notice to the employer, regardless of the type of service to be informed, unless giving such prior notice is precluded by military necessity or otherwise impossible or unreasonable.

[2] Under the VRRA, the durational limit on military service, with respect to the employer relationship, was four years, and section 4312(c) of USERRA increased the limit to five years. Under both the old law and the new law, all involuntary service and some voluntary service are exempted from the durational limit. Please see Law Review 206 for a definitive summary of what counts and what does not count toward the four-year limit under the VRRA and the five-year limit under USERRA. I invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 800 articles about USERRA and other military-relevant laws, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

[3] In its first case construing the VRRA, the Supreme Court enunciated the escalator principle when it held: "The returning veteran does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946).

[4] Paragraphs (2) through (6) are not believed to be relevant here.

[5] On liberal construction, he cited *Coffy v. Republic Steel Corp.,* 447 U.S. 191, 196 (1980).